Filed 2/22/17 In re Carlos H. CA1/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| In re CARLOS H., a Person Coming Under the Juvenile Court Law. | |
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>CARLOS H.,<br>Defendant and Appellant. | A148154<br><br>(City & County of San Francisco Super. Ct. No. JW12-6397) |

Carlos H. appeals a juvenile court order redeclaring wardship and placing him on home probation after he admitted possessing a concealable firearm and an assault weapon on two different occasions. On appeal, he challenges probation conditions that require him (1) to submit to warrantless searches of his electronic devices and provide passwords to his devices and social media accounts and (2) to abide by a boundary stay-away order. We conclude that the electronic search condition is reasonably necessary to ensure minor's compliance with the terms of his probation but that the condition must be modified to eliminate possible overbreadth. We find no error with regard to the stay-away order. As modified, the order of probation will be affirmed.

## Background

Carlos was initially declared a ward January 2013 after he admitted two petitions alleging a robbery and a misdemeanor criminal threat. Since then, Carlos has been in and

out of juvenile custody numerous times and admitted two criminal offenses. The underlying offenses in the present action were committed in late 2015 after Carlos had absconded from his most recent group home placement.

On January 6, 2016, a petition was filed alleging that Carlos possessed a concealable firearm on October 22, 2015 (Pen. Code,[1] § 29610). On February 24, 2016, a petition was filed alleging that on December 9, 2015, Carlos possessed an assault weapon (§ 30605, subd. (a)) and that he had received a large capacity magazine (§ 32310, subd. (a)). Carlos admitted the concealable firearm charge as a misdemeanor and the assault weapon charge as a felony. The third charge was dismissed.

The disposition report prepared by the probation department states, "Reports indicates that minor is involved in Norteño gangs. The minor denies being a part of a gang, but admits that he associates with Norteño gang members from different areas."

The court redeclared wardship and placed Carlos on probation subject to numerous probation conditions including warrantless searches, a geographic stay-away order, no contact with crime associates, no weapons, no gang involvement or insignias, drug/alcohol testing, counseling, job training, and a curfew. Carlos timely filed a notice of appeal.

## Discussion

*1. Electronic Search Condition*

The electronic search condition provides: "Any electronic and/or digital devices in your possession or under your custody or under your control may be searched at any time of the day or night, by any peace or probation officer, with or without a warrant or with or without reasonable or probable cause. Electronic and/or digital devices include but are not limited to cell phones, smartphones, iPads, computers, laptops and tablets. You are also ordered to provide any and all passwords to the devices upon request to any peace or probation officer." In addition, Carlos was ordered to "disclose passwords . . . for his

[1] All statutory references are to the Penal Code unless otherwise noted.

social media accounts to probation officer[s] and law enforcement officers, police officer without reasonable or probable cause upon request."

Carlos claims the electronics search condition (1) is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481; (2) is precluded by the California Electronic Communications Privacy Act (ECPA) (§ 1546 et seq.); (3) violates his Fifth Amendment rights; and (4) is unconstitutionally overbroad.

Initially, we reject the argument that the search condition violates *People v. Lent*, *supra*, 15 Cal.3d 481. Under *Lent*, a probation condition is "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent*, p. 486; *In re P.O.* (2016) 246 Cal.App.4th 288, 294.) A condition is invalid only if all three prongs of Lent are met. (*In re P.O.*, p. 294.)

We need not decide whether the condition meets the first and second prong of the *Lent* test, because the condition fails the third prong. The condition is reasonably related to preventing future criminality. The conditions of probation require that Carlos avoid known gang members and prohibit his display of gang insignia. Carlos is required to avoid contact with named participants in the crimes and prohibited from contacting them "by telephone, e-mail, voice mail, pager code, letter, any social media, Facebook, Twitter, Instagram or message through someone else." Accordingly, the electronics search condition reasonably relates to the effective monitoring of Carlos's compliance with the no contact and gang conditions. In addition, the disposition report contains descriptions of photographs of Carlos posing with weapons that were posted on his or others social media accounts. Because Carlos is properly prohibited as a condition of probation from possessing weapons, the condition also relates to the effective monitoring of Carlos's compliance with that condition.

Nor does the condition violate the ECPA. As relevant to the present case, the ECPA, effective January 1, 2016, prohibits a government entity from accessing device information through physical interaction or electronic communication with the device

unless one of several statutory exceptions applies, including that the government entity has obtained a warrant or has obtained the consent of the possessor of the device. (§ 1546.1, subd. (a)(3), (c); Stats. 2015, ch. 651, § 1, eff. Jan. 1, 2016.).)[2] Contrary to Carlos's argument, the plain language of section 1546.1 does not prohibit the court from requiring a probationer to allow a warrantless search of his or her electronic devices. As the Attorney General argues, "the statute nowhere provided that a law enforcement officer examining electronic device information by physical interaction or electronic communication with a device, pursuant to an otherwise valid probation or parole search condition would lack a possessor's 'specific consent.' "

Moreover, any ambiguity in that regard was conclusively resolved by the January 2017 amendment to section 1546.1, subdivision (c). The amendment, among other things, added additional exceptions to section 1546.1, subdivision (c), including subdivision

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[2] Section 1546.1, subdivision (a) reads in relevant part: "Except as provided in this section, a government entity shall not do any of the following: [¶] . . . [¶] (3) Access electronic device information by means of physical interaction or electronic communication with the electronic device." At the time of Carlos's disposition hearing, section 1546.1, subdivision (c) read: "A government entity may access electronic device information by means of physical interaction or electronic communication with the device only as follows: [¶] (1) Pursuant to a warrant issued pursuant to Chapter 3 (commencing with Section 1523) and subject to subdivision (d). [¶] (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4 (commencing with Section 629.50) of Title 15 of Part 1. [¶] (3) With the specific consent of the authorized possessor of the device. [¶] (4) With the specific consent of the owner of the device, only when the device has been reported as lost or stolen. [¶] (5) If the government entity, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information. [¶] (6) If the government entity, in good faith, believes the device to be lost, stolen, or abandoned, provided that the entity shall only access electronic device information in order to attempt to identify, verify, or contact the owner or authorized possessor of the device. [¶] (7) Except where prohibited by state or federal law, if the device is seized from an inmate's possession or found in an area of a correctional facility under the jurisdiction of the Department of Corrections and Rehabilitation where inmates have access and the device is not in the possession of an individual and the device is not known or believed to be the possession of an authorized visitor. Nothing in this paragraph shall be construed to supersede or override Section 4576." (Stats. 2015, ch. 651, § 1.)

(c)(10), which authorizes a government entity to access electronic device information by means of physical interaction or electronic communication with the device "if the device is seized from an authorized possessor of the device who is subject to an electronic device search as a clear and unambiguous condition of probation, mandatory supervision, or pretrial release." (Stats. 2016, ch. 541, § 3.5, eff. Jan. 1, 2017).) The amendment also added subdivision (c)(9), which authorizes a government entity to access electronic device information by means of physical interaction or electronic communication with the device "if the device is seized from an authorized possessor of the device who is serving a term of parole under the supervision of the Department of Corrections and Rehabilitation or a term of postrelease community supervision under the supervision of county probation."

Contrary to Carlos's argument, subdivision (c)(10) applies to juvenile probation. The categories of adult offenders enumerated in subdivision (c)(9) do not limit the types of "probation" governed by subdivision (c)(10).

Carlos also argues that the condition is invalid because the recent amendment "does not authorize a requirement to disclose passwords." But neither does the amendment or the statute prohibit this requirement. In all events, the requirement undoubtedly is necessary to enforce the government's right to gain access to electronic device information in those situations in which access is authorized.

Finally, Carlos argues that insofar as the amendment changes the law, it cannot be applied retroactively to save a probation condition that was illegal when imposed. We disagree, however, with Carlos's premise that the amendment changed the law. As set forth above, because the statute was ambiguous regarding whether a valid probation condition qualified as "consent" under the statute, the amendment clarified that access pursuant to a valid search condition is permissible. (See *In re J.C.* (2016) 246 Cal.App.4th 1462, 1477, quoting *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [" ' " ' 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act,

where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. . . . [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.' " ' "].)

Next, Carlos argues that requiring him to produce his password and the contents of his email and social media accounts is compelling his testimony and therefore impermissible under the Fifth Amendment. We disagree. "The Fifth Amendment to the United States Constitution states that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . .' The high court has made clear that the meaning of this language cannot be divorced from the historical practices at which it was aimed, namely, the brutal inquisitorial methods of ' "putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source." ' [Citations.] . . . [T]he amendment prohibits the direct or derivative criminal use against an individual of 'testimonial' communications of an incriminatory nature, obtained from the person under official compulsion." (*People v. Low* (2010) 49 Cal.4th 372, 389-390.)

The search of Carlos's electronic devices, subject to a valid warrantless search condition, does not implicate his Fifth Amendment rights. It is a "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege [against self-incrimination]." (*United States v. Hubbell* (2000) 530 U.S. 27, 35-36; accord *Fisher v. United States* (1976) 425 U.S. 391, 401 ["[T]he Fifth Amendment protects against 'compelled self-incrimination, not the disclosure of private information.' "].)

Moreover, even assuming that the provision of his passwords is a "testimonial communication" (*United States v. Fricosu* (D. Colo. 2012) 841 F.Supp.2d 1232, 1236; *United States v. Kirschner* (E.D. Mich. 2010) 823 F.Supp.2d 665, 668) and that the

probation condition is compulsive, the probation condition itself does not violate Carlos's Fifth Amendment right against self-incrimination because it does not authorize the direct or derivative *use* of any compelled statements in a criminal proceeding. In *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1127, the California Supreme Court rejected the argument that the Fifth Amendment provided "a guarantee against officially compelled *disclosure* of potentially self-incriminating information." The court explained, "[T]he Fifth Amendment does not provide a privilege against the compelled 'disclosure' of self-incriminating materials or information, but only precludes the *use* of such evidence in a criminal prosecution against the person from whom it was compelled." (*Id*. at p. 1134; *Chavez v. Martinez* (2003) 538 U.S. 760, 767 [Compelled statements "of course may not be used against a defendant at trial [citation], but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs."].) A probationer has no right to be free of self-incrimination in a probation revocation proceeding and any compelled statements would be admissible in that instance. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435 ["Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. [Citations.] Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer."].) We are bound by *Maldonado* and *Chavez*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Since the probation condition does not purport to authorize the use of any statements against defendant in a criminal proceeding, it does not violate the Fifth Amendment.

Finally, Carlos argues that the electronics search condition is unconstitutionally overbroad "because it is not narrowly tailored to limit its impact on [his] privacy and free speech rights." When a probation condition imposes limitations on a person's constitutional rights, it " 'must closely tailor those limitations to the purpose of the condition' "—that is, the probationer's reformation and rehabilitation—" 'to avoid being invalidated as unconstitutionally overbroad.' " (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) Like other courts, we agree the electronics search condition implicates Carlos's

constitutional privacy rights and is not narrowly tailored to promote his rehabilitation and the public's protection. (*In re P.O.*, *supra*, 246 Cal.App.4th at p. 298.) Here, the court did not tailor the condition by limiting the types of data (whether on an electronic device or accessible through an electronic device) that may be searched. Instead, the condition "permits review of all sorts of private information that is highly unlikely to shed any light on whether [the minor] is complying with the other conditions of his probation." (*Ibid.*, citing *People v. Appleton* (2016) 245 Cal.App.4th 717, 725 ["[A] search of defendant's mobile electronic devices could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity. These could include, for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends."].) The minor's privacy interests may be infringed, but only to the extent the information searched is reasonably likely to yield evidence of gang activity, or other criminal activity and noncompliance with probation conditions. Accordingly, the electronic search condition must be modified to authorize only searches of Carlos's text messages, e-mail, telephone call history, voice mail, or other communication programs like FaceTime or Skype, and social media accounts. The search condition will not permit access to other accounts or data stored or accessed by minor on his cell phone.[3]

*2. Boundary Stay-away Condition*

Another probation condition restricts Carlos from being present in an approximately 1.5 square-mile area in the Mission District of San Francisco. The condition allows Carlos to travel through the area on public transportation but prohibits him from getting off at any stops. He is allowed to travel through the area in a car only when his mother is driving. He is also allowed to visit San Francisco General Hospital for treatment or to see an immediate family member.

[3] We retain our reservations as to the efficacy of these limitations (see *In re J.B.* (2015) 242 Cal.App.4th 749, 758-759), but cannot better define the permissible scope of a cell phone search while prohibiting excessively broad searches that go beyond what is reasonably necessary to monitor the terms of probation.

At the dispositional hearing, Carlos's attorney objected to the probation department's request that Carlos be ordered to stay away from numerous locations in the Mission District, including Mission Street from 16th Street to the Daly City border. He asked that the restriction be narrowed to La Raza Park and Mission Street between 15th and Cesar Chavez Streets. The court indicated that it was inclined to "impose a stay away but a stay away that is very clear and written out so that it doesn't have all these different individual places." Ultimately, the court, the prosecutor and Carlos's attorney agreed to an area that is generally the shape of a rectangle bounded by 14th Street, Church Street, 30th Street, and Potrero Avenue. The precise area is shown on a map attached to the court's order.

On appeal, Carlos contends the stay-away condition is unreasonable under *People v. Lent, supra,* 15 Cal.3d 481. The condition, however, is reasonably related to Carlos's potential future criminality. (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.) "Prohibitions against a variety of gang-related activities have been upheld when imposed upon juvenile offenders. [Citations] Because '[a]ssociation with gang members is the first step to involvement in gang activity,' such conditions have been found to be 'reasonably designed to prevent future criminal behavior.' " (*Ibid*., fn. omitted.) The record in this case contains ample evidence of Carlos's gang contacts to support the stay away condition.

Carlos also contends the condition is constitutionally overbroad because it is not narrowly tailored to limit its impact on minor's travel and association rights. A probation condition may be overbroad if it restricts constitutionally protected conduct. (*People v. Lopez, supra*, 66 Cal.App.4th at p. 630.) However, a probation condition may permissibly impinge upon a constitutional right if it fosters rehabilitation and protects public safety, because a probationer is not entitled to the same degree of constitutional protection as other citizens. (*Id*. at p. 624.) "The permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults. '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of

children reaches beyond the scope of its authority over adults." ' " (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) Generally, when a travel ban does not banish a minor from his home, but rather prevents the minor from entering a locale where he might do or suffer harm, or where he cannot be adequately supervised, the ban is permitted. (*Id*. at pp. 916-917, fn. 11; *In re Pedro Q*. (1989) 209 Cal.App.3d 1368, 1373 [While "a travel restriction may be proper for a minor who lives outside the gang's territory, it may be overbroad for one who lives, works or goes to school within the area."].) In *Victor L*., the court held that a condition that ordered minor him to stay away from "areas known by [him] for gang-related activity" was unconstitutionally vague. The court observed, however, that if "the condition of probation was intended to proscribe [minor] him from entering his own gang's 'turf' to help him avoid the temptation to further his gang involvement . . . [o]ne method of better defining such forbidden areas would be to establish descriptive or mapped boundaries for that purpose." (*In re Victor L*., at p. 916.)

Carlos argues that excluding him from this large mapped area, was overbroad "because even though the presence of the Bryant Street gang in some areas in the Mission District suggested some relation to minor's offenses, a blanket prohibition from that area was 'unduly harsh' because mere presence in that area did not necessarily mean the minor was participating in gang activity or in possession of firearms. [Citation.] There were countless innocent reasons minor could be in the area, which contains schools, parks, libraries, government buildings, cultural centers, and restaurants. [Citation.] Even though prohibition from that area could in some way be related to preventing future criminality, the condition was too broad. [Citation.] Even though its purpose is to prevent future gang participation, the condition unreasonably restricts access to parks, restaurants, libraries, shops and other community and public spaces."

The record establishes, however, that Carlos does not live or have a job in the restricted area and his mother made clear she did not want him anywhere near the Mission District because of the bad influences he encounters there. The dispositional report identifies numerous locations throughout the restricted area where known gang

members congregate. The boundary map adopted by the court was carefully and reasonably chosen to restrict Carlos's exposure to gang contacts within the area. Finally, Carlos's suggestion that placement of the southern border on Cortland, rather than Cesar Chavez rendered the restricted area overbroad is inconsistent with his concession at the disposition hearing. Carlos's attorney expressly stated that he would "defer to the court whether it wants Cesar Chavez or 30th" but that Cesar Chavez made sense because it is a "logical major thoroughfare." The court, however, was insistent that 30th Street rather than Cesar Chavez be the southern boundary, and Cortland Avenue is a reasonable "major thoroughfare" between 30th Street and Potrero Avenue (using Bayshore Boulevard to close the gap). Accordingly, there was no error in the boundary stay away condition imposed by the court.

**Disposition**

The electronic search condition of probation shall be modified to read: "Any electronic and/or digital devices in your possession or under your custody or under your control may be searched for text messages, email, telephone call history, voice mail, or other communication programs like FaceTime or Skype, and social media accounts at any time of the day or night, by any peace or probation officer, with or without a warrant or with or without reasonable or probable cause. Electronic and/or digital devices include but are not limited to cell phones, smartphones, iPads, computers, laptops and tablets. You are also ordered to provide any and all passwords to the devices and social media accounts upon request to any peace or probation officer."

As so modified, the order of probation is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.